

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

**WILLIAM JENNINGS,**

Plaintiff,

v.

**HONORABLE AVERN COHN**

**No. 13-13308**

**PATRICK FULLER, et al.,**

Defendants.

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**HEARING ON MOTIONS IN LIMINE - VOLUME 1**

**Tuesday, October 11, 2016**

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- - -

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1 Detroit, Michigan

2 Tuesday, October 11, 2016

3 10:20 a.m.

4 - - -

5 **THE CLERK:** The court calls the matter of *Jennings v.*  
6 *Fuller*, Case Number 13-13308.

7 **THE COURT:** Be seated.

8 Okay. We have a series of motions in limine. The first  
9 is the -- we'll take the defendants' motions first.

10 The first motion is to preclude the internal -- the  
11 plaintiff from introducing internal policies and procedures of  
12 the Genesee County Sheriff; is that right?

13 **MR. SCOTT:** Yes, Your Honor.

14 **THE COURT:** Do we have a copy of their procedures,  
15 the document they want to make reference to?

16 **MR. SCOTT:** It's not clear exactly --

17 **THE COURT:** What?

18 **MR. SCOTT:** I did not bring a copy of the general  
19 orders with me, Your Honor.

20 **THE COURT:** Come up here.

21 **MR. SCOTT:** I don't have a copy of the general  
22 orders. It's our position --

23 **THE COURT:** Mr. Ernst, do you have a copy of the  
24 regulations?

25 **MR. ERNST:** I don't have a copy of the document

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1     itself.

2                 **THE COURT:**   Well, how can I deal with what you want  
3     to exclude if I don't know what it is?

4                 **MR. SCOTT:**   It's the defendants' position,  
5     Your Honor, that there is no *Monell* claim or other claim  
6     against --

7                 **THE COURT:**   I'm sorry, sir, we have to start -- your  
8     motion is to preclude from introducing internal policies and  
9     procedures, and I want to know -- that's a particular document,  
10    and I want to see the document. I'm not going to issue -- a  
11    general order -- until I see the document I can't even begin to  
12    deal with it. I think that's simple enough.

13                **MR. SCOTT:**   I hear what you're saying, Your Honor.  
14    We can certainly address it. We can bring the policies and  
15    procedures at a later date.

16                **THE COURT:**   Well, let's assume they have policies and  
17    procedures governing the conduct of their offices. What  
18    arguable relevance -- and assume they are going to want to  
19    introduce evidence that they violated the policies and  
20    procedures. Of what arguable relevance is that to the issues  
21    in this case, Mr. Ernst, or whoever is going to argue? Come up  
22    here.

23                **MR. ERNST:**   Well, the relevance, Your Honor, is, as  
24    set forth in the case law that I submitted to the Court, is  
25    that the jury can consider all of the circumstances surrounding

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1 the use of force. So, for example, if the officers violate  
2 their own training, their own policies and procedures, then the  
3 jury can consider that in whether the use of force was  
4 unreasonable. Those policies and procedures don't set the  
5 Constitutional bar or the standard, but it is something that  
6 the jury can consider.

7 **THE COURT:** Do you know what those policies and  
8 procedures say?

9 **MR. ERNST:** Yes, I do. Some of them involve, for  
10 example, if they, if they spray somebody with pepper spray,  
11 they are supposed to wash them off right away and they are not  
12 supposed to put a spit hood on them before they wash them off.  
13 They are not supposed to lay them on their stomach, things like  
14 that.

15 **THE COURT:** Okay. That's number one.  
16 Number two, have I seen your jury instructions yet?

17 **MR. ERNST:** Yes.

18 **THE COURT:** No, I objected to the draft that you gave  
19 me in the office, and I told you to get started on a new set.

20 **MR. ERNST:** Your Honor, I believe what the Court  
21 instructed us to do is to submit our proposed instructions to  
22 the defendant and they were going to red-line them.

23 **THE COURT:** Yeah. Has that been done yet?

24 **MR. SCOTT:** Yes. Your Honor, I set a copy of  
25 proposed joint instructions to Mr. Elliott last week. I have

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1 not heard back from him.

2 **THE COURT:** Well, until I see the instructions and  
3 how you define the use of excessive force and what role you say  
4 the rules and regulations play, I can't rule on this motion. I  
5 know that the case law is divided, it goes both ways, so until  
6 I see the rules, until I see how the jury is going to be  
7 instructed, I'm going to reserve decision.

8 Is there any Michigan law on this subject?

9 **MR. ERNST:** State law, Your Honor?

10 **THE COURT:** Yeah.

11 **MR. ERNST:** No.

12 **THE COURT:** There's no state law at all?

13 **MR. ERNST:** No.

14 **THE COURT:** Is there any law in the Sixth Circuit?

15 **MR. ERNST:** Yes.

16 **THE COURT:** Which case?

17 **MR. SCOTT:** We cite *Smith v. Freland*, Your Honor.

18 **THE COURT:** Let me see the case.

19 **MR. ERNST:** This isn't an actual copy of the case.

20 This is just my brief. In *Smith v. Freland* --

21 **THE COURT:** Ben, do we have a copy of the case?

22 **THE CLERK:** I quote the relevant parts, but I can go  
23 print --

24 **THE COURT:** Where is it?

25 **THE CLERK:** There.

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1           **THE COURT:** Wait a second, wait a second. *Smith v.*  
2 *Freland*. This is what the Sixth Circuit said:

3           "Furthermore, the fact that Officer Schulcz' actions  
4 may have violated ... policies regarding ... use of  
5 force does not require a different result. Under  
6 1983, the issue is whether [the officer] violated the  
7 Constitution... A city can ... hold its officers to  
8 a higher standard... To hold that those cities with  
9 strict policies commit more Constitutional violations  
10 than those with lax policies would be an unwarranted  
11 extension of the law...

12           They adopted the rule that they weren't relevant in that  
13 case.

14           **MR. ERNST:** Well, Your Honor, if I may, I think what  
15 the *Smith* case says is that the fact that there is, that the  
16 police officer violated the policies does not make it a  
17 Constitutional violation in and of itself and --

18           **THE COURT:** And then Judge Borman said -- well, we  
19 don't have *Alverado*. Those are the two cases.

20           Okay. I'm going to reserve decision on that until I get a  
21 copy of them and I see the instructions on how they are dealt  
22 with because I'm going to have to give the jury a limiting  
23 instruction that violation of the policy per se is not a  
24 Constitutional wrong, but it can be taken into consideration in  
25 judging the police officers' conduct. Okay?

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1           **MR. ERNST:** Yes, Your Honor.

2           **THE COURT:** That's that one. What's the next one?

3           **MR. SCOTT:** The next one, Your Honor, is Defendants'  
4 Motion in Limine to Preclude Evidence/Argument Regarding  
5 Unreasonable Seizure, Arrest, Detention and Prosecution.

6           **THE COURT:** Keep your voice up. What?

7           **MR. SCOTT:** Defendants' Motion in Limine to Preclude  
8 Evidence and Argument Regarding Unreasonable Seizure, Arrest,  
9 Detention and Prosecution in Violation of 4th and 14th  
10 Amendments.

11           **THE COURT:** I don't understand what you're talking  
12 about.

13           **MR. SCOTT:** Essentially, Your Honor, the defendants  
14 are saying that plaintiff's claim regarding unlawful  
15 prosecution, seizure, detention is precluded by collateral  
16 estoppel and lack of evidence. This is an excessive force  
17 case, number one, alleged in the complaint, but there's a  
18 collateral claim apparently against Deputies Fuller and  
19 Kennamer only regarding unlawful prosecution, seizure,  
20 detention.

21           **THE COURT:** Is this the malicious prosecution?

22           **MR. SCOTT:** Exactly. I think it's malicious  
23 prosecution, but that's not how it's specifically pled in the  
24 complaint. They pleaded it a little bit differently than that.

25           **THE COURT:** Well, what is the little difference? The



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1 difference is excessive force.

2 **MR. SCOTT:** Well, they use the words "unreasonable  
3 seizure, arrest, detention and prosecution." It's our position  
4 that essentially --

5 **THE COURT:** Do you know what he's talking about?

6 **MR. ERNST:** I don't know, Your Honor. I have a  
7 malicious prosecution claim and --

8 **THE COURT:** Yeah, but they presented the facts to the  
9 prosecutor and the prosecutor issued a complaint.

10 **MR. ERNST:** Right, based on false, false --

11 **THE COURT:** Well, I want to see the statements. Do  
12 you have the statements?

13 **MR. ERNST:** Yeah, they are the police reports.

14 **THE COURT:** Have you got a copy of it here?

15 **MR. ERNST:** No, Your Honor. I didn't --

16 **THE COURT:** Please, I can't deal in the abstract. I  
17 want to know the parameters of that claim.

18 **MR. ERNST:** Your Honor, we dealt with this, we dealt  
19 with this in the motion for summary judgment that was filed  
20 months and month ago, and we set forth all of the statements,  
21 the testimony at the preliminary exam that constituted the  
22 materially false statements.

23 **THE COURT:** Wait a second.

24 **MR. SCOTT:** Your Honor, only one defendant testified  
25 at the preliminary exam.

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1           **THE COURT:** What?

2           **MR. SCOTT:** Your Honor, only one defendant testified  
3 in the preliminary exam that resulted in the probable cause  
4 finding. That was Deputy Fuller. His testimony is cited in  
5 the motion. It's unrebutted that Mr. Jennings bit Deputy  
6 Fuller, and that resulted in charges against Mr. Jennings.

7           **MR. ERNST:** No, that's not true, Your Honor. Deputy  
8 Fuller testified that Jennings pulled his arm away from the  
9 wall, turned aggressively --

10          **THE COURT:** All of that is part of the excessive  
11 force claim.

12          **MR. ERNST:** No, we have a malicious prosecution  
13 claim.

14          **THE COURT:** I know, but what is the malicious  
15 prosecution claim?

16          **MR. ERNST:** That they prosecuted him for resisting  
17 and obstructing without probable cause. That's our claim.

18          **THE COURT:** No, they told the prosecutor what  
19 occurred, and the prosecutor said this is enough to raise a  
20 criminal complaint.

21          **MR. ERNST:** No, they --

22          **THE COURT:** Where is the complaint?

23          **MR. ERNST:** They lied to the prosecutor about what  
24 happened and that's what caused him to issue --

25          **THE COURT:** No, wait, wait.

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1           **MR. SCOTT:** The Complaint is Exhibit B to our motion,  
2 Your Honor. On the Complaint is Lieutenant Tocarchick, who is  
3 not a party to this case.

4           **THE COURT:** No, all of this is subsumed by the claim  
5 for use of excessive force.

6           **MR. ERNST:** Well, Your Honor, we have a separate  
7 claim for malicious prosecution.

8           **THE COURT:** I know you have a separate claim for  
9 malicious prosecution, but they told their story to the  
10 prosecutor. It's not necessarily that they lied. They gave  
11 him their version of what occurred, and the prosecutor on that  
12 basis issued a warrant.

13           **MR. ERNST:** And Sykes specifically says that the  
14 police cannot hide behind the decision, they are not immunized  
15 by the decision of the prosecutor if they provide materially  
16 false information.

17           **THE COURT:** I don't know that it was materially  
18 false.

19           **MR. ERNST:** Well, that's for the jury to decide.

20           **THE COURT:** No, it isn't for the jury to decide. If  
21 the jury decides that it was false, then you are going to  
22 prevail on the excessive force claim. So it's the same thing  
23 as the excessive force claim.

24           **MR. ERNST:** Your Honor, I beg to differ. What the  
25 officers say has nothing to do with their excessive force

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1 claim. What they told the prosecutor has nothing to do --

2 **THE COURT:** No, they described their conduct to the  
3 prosecutor.

4 **MR. ERNST:** Right, and that's the basis of the  
5 malicious prosecution claim.

6 **THE COURT:** No, no, no, no, no. I'll want to see  
7 your jury instruction. All you're saying is their description  
8 of what occurred, their description of what occurred -- if you  
9 prevail on the excessive force claim, then their description of  
10 what occurred will not prevail. It's the same evidence. They  
11 are going to describe what they said was their conduct, and on  
12 the basis that they gave it to the prosecutor, he found it  
13 sufficient -- he found probable cause.

14 What you're saying, I think, is every time you have an  
15 excessive -- you prevail on an excessive -- every time there's  
16 an incident involving an interaction between a police officer  
17 and a citizen and on the basis of that interaction the police  
18 officers take their version of what occurred to a prosecutor  
19 and the prosecutor on that basis issues a warrant, he's  
20 listened to them, he believes them, he believes them, and a  
21 warrant is issued and subsequently they decide not to go  
22 forward with the case, and then they prevail on their excessive  
23 force claim because their version of what occurred when they  
24 tell it to a jury, the jury decides excessive force occurred,  
25 automatically there's a malicious prosecution claim.

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1           **MR. ERNST:** No, that's not true at all. That's not  
2 true at all.

3           **THE COURT:** That's what you're saying.

4           **MR. ERNST:** No, that's not what I'm saying, Your  
5 Honor. There's all types of situations where they could still  
6 legitimately charge somebody and use excessive force when  
7 their -- when they take them into custody or something. That  
8 the person could have done something illegal --

9           **THE COURT:** Well, you give me your jury instruction  
10 on malicious prosecution, then we'll see.

11           **MR. ERNST:** Okay. And I'm relying on a very clear  
12 Sixth Circuit case, *Sykes*.

13           **THE COURT:** Which is that?

14           **MR. ERNST:** It's *Sykes v. Anderson*, 625 F.3d 294, a  
15 Sixth Circuit case from 2010.

16           **THE COURT:** Okay, okay.

17           **MR. ERNST:** Which clearly says that if the police --

18           **THE COURT:** All right. I will look at those  
19 two cases again. Okay?

20           **MR. ERNST:** Okay.

21           **THE COURT:** And I want your jury instruction.

22           **MR. ERNST:** Okay.

23           **THE COURT:** Okay?

24           **MR. ERNST:** Got it.

25           **THE COURT:** And the exhibits which relate to --

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1           **MR. ERNST:** The policies and procedures and the false  
2 statements.

3           **THE COURT:** Yeah.

4           **MR. ERNST:** Okay.

5           **THE COURT:** Thank you. Okay.

6           Now, what motions do you have?

7           **MR. ERNST:** Well, we just filed them. Defendants  
8 haven't had a chance to respond, Your Honor.

9           **THE COURT:** That's all right. They can respond  
10 orally. What are the motions you want?

11          **MR. ERNST:** I'm sorry, Your Honor?

12          **THE COURT:** What motions do you have?

13          **MR. ERNST:** We have various motions in limine  
14 regarding evidence.

15          **THE COURT:** Where is his motions? Two of them.

16          **MR. ERNST:** And we have one other one that's going to  
17 be filed momentarily.

18          **THE COURT:** What?

19          **MR. ERNST:** We have one other one that's going to be  
20 filed momentarily.

21          **THE COURT:** You have a motion?

22          **MR. ERNST:** We have a motion about keeping out his  
23 history of substance abuse.

24          **THE COURT:** Okay. What arguable relevance is his  
25 history of drug abuse?

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1           **MR. SCOTT:** This whole incident stems --

2           **THE COURT:** What?

3           **MR. SCOTT:** The defendants' position is this whole  
4 incident is a result of Mr. Jennings' uncontrollable behavior  
5 in the jail. He was intoxicated by alcohol. There's no  
6 question. The arresting officer did testing on the road, and  
7 he believed he was --

8           **THE COURT:** Okay. That's not drug use.

9           **MR. SCOTT:** Well, the nystagmus test performed by the  
10 arresting officer, who is not a defendant, says right in his  
11 report that it indicated he was under the influence of  
12 something other than alcohol.

13           **MR. ERNST:** And that's just nonsense.

14           **THE COURT:** That's hearsay.

15           **MR. SCOTT:** Well, there's medical records that show  
16 he has a history of substance abuse, et cetera.

17           **THE COURT:** I know there's medical records, but who  
18 said he was under the influence of -- that's highly  
19 prejudicial, and unless you can establish that he was drugged  
20 up, that's a bad way of putting it, that he was suffering from  
21 the use of drugs, no.

22           **MR. SCOTT:** Several of the defendants are long-time,  
23 very experienced police officers, and they will testify they  
24 have dealt with hundreds, if not thousands, of people that were  
25 intoxicated by alcohol --

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1           **THE COURT:** No, no. They can't do that. No, that's  
2 highly prejudicial. That's highly prejudicial. More  
3 prejudicial than probative. In the circumstances of this case  
4 and in the circumstances of the videos. It's the videos that  
5 are important here. You can't -- unless you can establish that  
6 at the time he was arrested and taken into custody he was under  
7 the influence of drugs.

8           **MR. ERNST:** And, Your Honor, we have several tests,  
9 toxicology tests that were performed on him. All of them show  
10 that they were negative for drugs, and he wants his witnesses  
11 to speculate that he must have been high because --

12           **THE COURT:** You know, Mr. Ernst, there's an old, old  
13 rule that you keep violating because you're going to talk me  
14 out of it if you talk too much.

15           **MR. SCOTT:** Your Honor, one more --

16           **THE COURT:** No, when you come to your case in chief,  
17 your defense, you will let the Court know that you want to  
18 introduce evidence of drug use and at that time I'll revisit  
19 the ruling depending upon what the record shows, but as of now  
20 there will be no mention of drug use in the opening statement  
21 or in any question that you ask. At that point you will, you  
22 will ask for a recess and I'll revisit this ruling.

23           **MR. ERNST:** And, Your Honor, I would ask the Court to  
24 instruct counsel to --

25           **THE COURT:** What?



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1           **MR. ERNST:** I would ask the Court to order counsel to  
2 instruct his defendants not to do it because I intend to call  
3 them in my case in chief.

4           **THE COURT:** Likewise. You tell your witnesses and  
5 your defendants that they can't do that.

6           **MR. SCOTT:** Okay. One more thing, Your Honor. On  
7 that issue as to damages, plaintiff has a claim, he's  
8 essentially claiming Post-Traumatic's Stress Disorder and other  
9 psychological conditions, and I think it's potentially -- we  
10 have an expert neuropsychologist that may offer testimony  
11 regarding this guy's background, essentially being a substance  
12 abuser, being involved in prison for substance abuse or drugs,  
13 et cetera. These are all issues that go to his mental --

14           **THE COURT:** That's something different. What's your  
15 response to is that, Mr. Ernst?

16           **MR. ERNST:** Well, Your Honor --

17           **THE COURT:** It goes to the claim for damages.

18           **MR. ERNST:** Well, Your Honor, we're talking about  
19 things that happened years before this incident, and his  
20 damages are Post-Traumatic Stress Disorder from getting beat.  
21 How does the fact that he used drugs in the history before this  
22 incident have anything to do with whether he has Post-Traumatic  
23 Stress Disorder from a traumatic event?

24           **THE COURT:** Have you got a report from your expert?

25           **MR. SCOTT:** We do, Your Honor.

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1           **THE COURT:** Have you shown it to Mr. Ernst?

2           **MR. SCOTT:** Yes. His deposition is this evening.

3           **THE COURT:** I want to see the deposition testimony  
4 because I -- I want to see the deposition testimony because  
5 what you're leading me to is that we bifurcate liability and  
6 damages with the same jury. That the jury doesn't hear any  
7 testimony about drug use in the liability phase. That's the  
8 only way to eliminate the prejudice. I want to see the  
9 expert's testimony, his report.

10           **MR. SCOTT:** Okay. We can get you the report, and  
11 like I said, his deposition is this evening.

12           **THE COURT:** And the deposition, but I want to see the  
13 report. I assume you got a report before the deposition.

14           **MR. SCOTT:** Yes, we have a report.

15           **THE COURT:** Let me see the report.

16           **MR. SCOTT:** I don't have it with me, Your Honor.

17           **THE COURT:** Well, then you will submit it.

18           **MR. SCOTT:** Sure, I will.

19           **THE COURT:** Okay. What else? We have gone by drug  
20 use. What's the second motion, Mr. Ernst?

21           **MR. ERNST:** I'm sorry, Your Honor.

22           (Discussion held off the record.)

23           **MR. ERNST:** Your Honor, one of the other things with  
24 regard to their expert that I would just point out for the  
25 Court is that the expert, in his report he basically contrasts

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1 the testimony of our client versus the testimony of other  
2 people and comments on it and it's like --

3 **THE COURT:** I haven't seen the report, Mr. Ernst.

4 **MR. ERNST:** I just want to give the Court notice, but  
5 our other motions deal with their attempt to call a bunch of  
6 people on their witness list to act as experts who they have  
7 never provided reports on in violation of --

8 **THE COURT:** Who are these witnesses? Where is their  
9 witness list?

10 Have we got that up here, Ben?

11 **MR. ERNST:** I don't have it with me. I didn't think  
12 we were going to argue those today since the defendants haven't  
13 responded to it.

14 **MR. SCOTT:** I have the witness list if you care to  
15 see it. The motion only addresses five witnesses, Your Honor,  
16 and we won't be calling three of those five witnesses.

17 **THE COURT:** All right. Who are the two you are going  
18 to call?

19 **MR. SCOTT:** We plan on calling Undersheriff  
20 Christopher Swanson.

21 **THE COURT:** Wait a minute, wait a minute.  
22 Defendants -- didn't I tell you to file an amended witness  
23 list?

24 **MR. ERNST:** You did, Your Honor.

25 **THE COURT:** Didn't I comment on this?

*Defense Witnesses*  
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1           **MR. SCOTT:** There was suggestion regarding the  
2 witness list, and you said to submit it without the caption on  
3 it before we give it to the jury.

4           **MR. ERNST:** Well, you also told them to file an  
5 amended without the judges listed on it and the prosecutor.

6           **MR. SCOTT:** That issue was reserved until we had a  
7 ruling on the motion that we argued this morning that you took  
8 under advisement because we wouldn't need prosecutors,  
9 et cetera, if there is no malicious prosecution.

10          **THE COURT:** We are talking about the experts.

11          **MR. SCOTT:** It had nothing to do with that.

12          **THE COURT:** Who are the experts?

13          **MR. SCOTT:** The two people at issue, there's  
14 Undersheriff Christopher Swanson. If Your Honor is going to  
15 rule that the policies and proceeding come in, Swanson will  
16 come in and explain those policies and talk about how the  
17 behavior is consistent with the policies or, you know,  
18 essentially explain the issue involving the policies and  
19 procedures in conjunction with reports and what happened here.

20          **MR. ERNST:** That's an expert, Your Honor, and they  
21 didn't provide us a report, and they have another policies and  
22 procedures expert, Mr. Ross.

23          **THE COURT:** You can't have anybody express an opinion  
24 without giving them a report first.

25          **MR. SCOTT:** Well, essentially he's a fact witness

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1 that would offer explanation as to various things based on his  
2 experience with these policies and procedures.

3 **THE COURT:** Well, until I see that -- no, no.

4 **MR. ERNST:** He's going to express an opinion,  
5 Your Honor, that this was --

6 **THE COURT:** No. Until I see that policy and  
7 procedure document I can't rule, but I think the policy and  
8 procedure document is a supplement to the instruction on  
9 Constitutional, and if you've got an expert on police  
10 practices, that expert will have to incorporate it. I'm not  
11 going to let a deputy sheriff speak. That's not an expert.  
12 That's not an expert. He's associated with it.

13 And I don't think we get into an argument over whether --  
14 if the policy says you can't hit someone over the head, I don't  
15 think we will get an expert that comes in and explains what  
16 that means.

17 **MR. SCOTT:** Well, he can interpret these rules  
18 because he uses them on a daily basis.

19 **THE COURT:** I said I have not seen the rules.

20 **MR. SCOTT:** Right.

21 **THE COURT:** What's the other one?

22 **MR. SCOTT:** The other one would be Captain Jason  
23 Gould, who was a sergeant. He is a fact witness. He's the  
24 captain in charge of the jail now. He was the sergeant that  
25 was a supervisor that came in and he was the one that went into

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1 the safety cell and oversaw Mr. Jennings' release from the bed.

2 **THE COURT:** What's the objection?

3 **MR. ERNST:** Well, because what he lists on his  
4 witness list is that he's going to comments on the videos and  
5 the police reports and all of these things. In other words,  
6 he's going to opine on them. So I don't mind if he's going to  
7 testify as to what he saw and did that day, but he can't look  
8 at the video and the police reports and offer his opinions and  
9 characterize that evidence. He's essentially trying to call  
10 him as an expert.

11 **THE COURT:** He's a police expert.

12 **MR. ERNST:** What?

13 **THE COURT:** He's an expert.

14 **MR. ERNST:** But they never gave us a report.

15 **THE COURT:** He's got to have a report if he's going  
16 to express an opinion.

17 **MR. SCOTT:** He did a report in this case, but  
18 moreover, he had personal contact with Mr. Jennings. He's  
19 going to talk about --

20 **THE COURT:** No, no. Well, we'll see. We will go  
21 question by question, but he can't express any expert opinion  
22 without a report.

23 **MR. ERNST:** And it's far too late to file reports  
24 now.

25 **MR. SCOTT:** He's a fact witness, Your Honor.

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1           **THE COURT:** Well, we'll see. If he's a fact witness  
2 and you call him and you have an objection, Mr. Ernst, we'll  
3 deal with it at the time.

4           **MR. SCOTT:** He can testify as to what he saw and --

5           **THE COURT:** Did you hear what I said? We'll go  
6 question by question.

7           **MR. SCOTT:** He's the one, he took him from the safety  
8 cell to medical.

9           **THE COURT:** Did you hear what I just said?

10          **MR. SCOTT:** I understand, Your Honor.

11          **THE COURT:** What else?

12          **MR. SCOTT:** We are not using the other  
13 three witnesses that they complain about.

14          **THE COURT:** What else?

15          **MR. ERNST:** I think that's it right now, Your Honor.

16          **THE COURT:** What I've got to get from you is the --

17          **THE CLERK:** The defendant has a motion.

18          **MR. SCOTT:** We have a --

19          **THE COURT:** Apportionment of damages?

20          **MR. SCOTT:** Yes, Your Honor.

21          **THE COURT:** The jury is not going to apportion the  
22 damages. We can do it later. That's for the Court to decide,  
23 not for the jury.

24          **MR. SCOTT:** Well, it goes to more than damages. It's  
25 liability and damages, Your Honor, and it's essentially part of

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1 the excessive force standard.

2 **THE COURT:** No. I want to see what the jury  
3 instructions are. I'll deal with that -- and the verdict form.  
4 I told you that. I told you that last time. I'm not going to  
5 give you any ruling until I see the verdict form and the  
6 instruction on damages.

7 **MR. ERNST:** And he had submitted, he submitted  
8 seven separate verdict forms.

9 **THE COURT:** No, there is not going to be seven  
10 separate verdict forms. There's going to be a single verdict  
11 form.

12 **MR. ERNST:** And he's essentially asking for like a  
13 comparative negligence type of instruction.

14 **THE COURT:** There's no comparative negligence.

15 **MR. SCOTT:** We have also filed, Your Honor, on Friday  
16 pursuant to your instructions objections to plaintiff's witness  
17 list and verdict form and --

18 **THE COURT:** I just got it Friday? He hasn't had a  
19 chance -- let me see what you filed.

20 What other motion are you going to file, Mr. Ernst?

21 **MR. SCOTT:** Your Honor, the last time we were here,  
22 my understanding was you instructed us to file objections to --  
23 whatever objections we wanted to raise before trial by Friday  
24 for this hearing. So we filed those objections, including that  
25 apportionment brief.



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1           **THE COURT:** Well, wait a second. What did you file  
2 Friday?

3           **MR. SCOTT:** We filed Defendants' Objections to  
4 Plaintiff's Proposed Trial Witnesses, Defendants' Objections to  
5 Plaintiff's Proposed Verdict Form and Defendants' Objections  
6 to -- along with that apportionment brief.

7           **THE COURT:** Wait a second. Hold on a second.

8 All right. Let's review briefly what we've covered here  
9 today.

10 So we've got, first we've got your motion re: policies and  
11 procedures, right?

12           **MR. SCOTT:** Yes, Your Honor.

13           **THE COURT:** All right. That -- the brief is Document  
14 73. Is there a separate motion paper?

15           **MR. SCOTT:** It's all Document 73, Your Honor.

16           **THE COURT:** What?

17           **MR. SCOTT:** It's all Document 73.

18           **THE COURT:** Okay. And then we have, we have -- okay.  
19 The answer is Document 98. What I have ruled is I want to see  
20 the document, policies and procedures, and I want to see the  
21 instruction. And I have said tentatively there can be  
22 reference to them. That's the first motion.

23 The second motion --

24           **MR. SCOTT:** Your Honor, to the extent there is  
25 reference --

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1           **THE COURT:** What?

2           **MR. SCOTT:** To the extent there's any reference,  
3 there's a limiting instruction regarding how they can be relied  
4 upon.

5           **THE COURT:** Yeah.

6           The second motion is the motion re: malicious prosecution.  
7 That's what we're going to call that document. That's Document  
8 76 and --

9           **MR. ERNST:** The response is 97, Your Honor.

10          **THE COURT:** Document 97.

11          I want documents supporting the claim, right?

12          **MR. ERNST:** Correct.

13          **THE COURT:** And the instruction.

14          **MR. ERNST:** And the Court indicated it was going to  
15 review the *Sykes v. Anderson* case.

16          **THE COURT:** What are the cites?

17          **MR. ERNST:** 625 F.3d 294.

18          **THE COURT:** 625.

19          **MR. ERNST:** F.3d 294.

20          **THE COURT:** 294.

21          **MR. ERNST:** Yes.

22          **THE COURT:** And what else?

23          **MR. ERNST:** Sixth Circuit, 2010.

24          **THE COURT:** I know. What's the other reference?

25          **MR. ERNST:** That was, that was the controlling case

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1 on that issue.

2 **THE COURT:** That's the controlling case.

3 **MR. ERNST:** I submitted the jump cites in Document  
4 97.

5 **THE COURT:** Pardon?

6 **MR. ERNST:** I submitted the jump cites, the specific  
7 page numbers in Document 97.

8 **THE COURT:** 97 or 91?

9 **MR. ERNST:** Document 97 is our response.

10 **THE COURT:** Okay. Document 97.

11 Now, those are two of the defendants' motions.

12 **MR. ERNST:** Right.

13 **THE COURT:** Then we've got, three, motion re: drug  
14 use, and I have said that's granted subject to the Court must  
15 see expert report.

16 **MR. SCOTT:** Your Honor, I understand your ruling.  
17 This motion was just filed yesterday at 3:00 p.m. We have  
18 had --

19 **THE COURT:** If you want to file a response, you can,  
20 but as of now, you heard what I said, but I want to see the  
21 expert's report.

22 **MR. SCOTT:** I understand.

23 **THE COURT:** What?

24 **MR. SCOTT:** I understand.

25 **THE COURT:** D may file answer.

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1           What's the fourth motion?

2                   **MR. ERNST:** The fourth one concerned the other  
3 witnesses who were going to offer opinion testimony who had not  
4 provided --

5                   **THE COURT:** Wait a second. What document is this?  
6 Document 100.

7           What's the other motion? Experts. Motion re: witnesses.  
8 What document is that, sir?

9                   **MR. ERNST:** I don't have it.

10                   **THE CLERK:** 99.

11                   **THE COURT:** What?

12                   **THE CLERK:** 99.

13                   **THE COURT:** What document?

14                   **MR. ERNST:** 99, I believe.

15                   **THE COURT:** You haven't filed an answer to that.

16                   **MR. SCOTT:** We have not. They just filed that  
17 yesterday afternoon as well.

18                   **THE COURT:** All right. Then we're going to wait for  
19 an answer. Okay. Wait a second.

20           Then we've got two more motions here. We've got  
21 three more motions here. Wait a minute. Where is the one re:  
22 Witnesses?

23           Wait a minute. I'm trying to find the fourth motion.  
24 Where is that fourth motion? Okay. That's 99.

25           All right. Then we've got a fifth motion. D's objection

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1 to trial witnesses, that's Document 95. You've got to file an  
2 answer to that.

3 **MR. ERNST:** Yes, Your Honor.

4 **THE COURT:** Okay. Then we've got trial exhibits.  
5 That's Document 94. You've got to file an answer to that.

6 **MR. ERNST:** I mean I could deal with one component of  
7 it.

8 **THE COURT:** What?

9 **MR. ERNST:** I could deal with one component of it  
10 right now.

11 **THE COURT:** What?

12 **MR. ERNST:** They object to the MSP lab reports  
13 claiming we don't have a witness to authenticate them when they  
14 listed the lab tech who did the report in their witness list.

15 **THE COURT:** You want them to bring in a witness to  
16 authenticate the lab reports?

17 **MR. SCOTT:** Well, the concern I have, Your Honor, is  
18 I attempted to contact the toxicologist at the Michigan State  
19 Police, and she's no longer there and she can't be found. And  
20 they want to say that this report somehow helps them and is  
21 definitive on this drug issue, and I don't think that's the  
22 case and the person --

23 **THE COURT:** I haven't seen the exhibit yet. You  
24 don't dispute that it's an authentic document?

25 **MR. SCOTT:** It's a document, but I spoke with someone

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1 in the --

2 **THE COURT:** It's in the files and records of the  
3 State Police?

4 **MR. SCOTT:** Right, but the person that -- it doesn't  
5 mean what they say it means.

6 **THE COURT:** Well, I don't know. I would have to see  
7 the exhibit first. So you file your answer, okay?

8 And then there's another one. Proposed verdict form. I  
9 have told you before -- what's this motion?

10 **MR. SCOTT:** There's an issue regarding the proposed  
11 verdict form of plaintiff, number one. It has a claim on it  
12 regarding --

13 **THE COURT:** I told you guys before I'm not going to  
14 deal with motions on the verdict form or the instructions.  
15 We'll have a conference. When you're ready to have a  
16 conference, you will let the case manager know, and we'll deal  
17 with the verdict form and the instructions in a conference,  
18 okay?

19 **MR. SCOTT:** Okay, Your Honor.

20 **THE COURT:** We can't deal with it by motion.

21 And the last one is to apportion the damages. Did you  
22 file a brief in support of that?

23 **MR. SCOTT:** We filed -- it's essentially a brief.  
24 This issue has been discussed with Your Honor, and you said  
25 file something by Friday so we --

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1           **THE COURT:** Wait a second. What I have here is  
2 Document 93. Is there a brief accompanying it?

3           **MR. SCOTT:** Yes.

4           **THE COURT:** What document is it?

5           **MR. SCOTT:** It's all Document 93.

6           **THE COURT:** Okay. Wait a second.  
7 You will have to file a response to it.

8           **MR. ERNST:** All right. Very well.

9 I previously filed a memo on that issue, Your Honor, but  
10 I'll just refile it as a response.

11           **THE COURT:** Refile it as an answer.

12           **MR. ERNST:** Okay.

13           **THE COURT:** That's it. There's seven motions in  
14 limine. We have just covered them, right?

15           **MR. ERNST:** We have a couple more. One of them deals  
16 with his --

17           **THE COURT:** When are you going to file them?

18           **MR. ERNST:** Today.

19           **THE COURT:** Today.

20           **MR. ERNST:** One of them deals with his priors.

21           **THE COURT:** What's the motion?

22           **MR. ERNST:** One of them deals with his prior  
23 convictions.

24           **THE COURT:** Prior convictions. Wait a minute.  
25 What's the next one?

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1           **MR. ERNST:** One of them deals with the plaintiff's --  
2 or the defendants testifying to legal conclusions.

3           **THE COURT:** What?

4           **MR. ERNST:** It deals with the defendants testifying  
5 as to legal conclusions.

6           **THE COURT:** What defendant?

7           **MR. ERNST:** The defendants in these case, all of them  
8 pretty much, but I'll --

9           **THE COURT:** Well, I'll take a look at it, but it  
10 seems to me that's --

11           **MR. ERNST:** And their expert testifying as to legal  
12 conclusions.

13           **THE COURT:** Well, we'll see the motion.

14           **MR. ERNST:** And we'll include his report.

15           **MR. SCOTT:** He hasn't testified.

16           **MR. ERNST:** Well, he filed a report.

17           **THE COURT:** So there's nine motions.

18           **MR. ERNST:** That's correct.

19           **THE COURT:** Pardon?

20           **MR. ERNST:** I believe that's correct, Your Honor.

21           **THE COURT:** Okay. When you get ready for a  
22 conference on the instructions, you will let me know. I want  
23 to deal with them in advance. Thank you.

24           **MR. ERNST:** Thank you, Your Honor.

25           **MR. SCOTT:** Your Honor, by way of scheduling, we are



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1 picking the jury on Monday and trial on Tuesday. It's already  
2 Tuesday. We now have four motion responses to motions that  
3 have been filed and apparently two more motions coming --

4 **THE COURT:** We'll have another conference Friday  
5 morning, okay?

6 **MR. SCOTT:** Okay.

7 **MR. ERNST:** Very well, Your Honor.

8 **THE COURT:** And we'll have a conference on the jury  
9 instructions. Thank you.

10 **MR. ERNST:** Thank you, Your Honor.

11 **MR. SCOTT:** Thank you, Your Honor.

12 **THE COURT:** Wait a minute. Wait a second.

13 Okay. So there's two motions still coming, just to be  
14 sure we know what we're doing.

15 Okay. Thank you, sir.

16 **MR. ERNST:** Thank you, Your Honor.

17 **MR. SCOTT:** Thank you, Your Honor.

18 **MR. REISING:** Thank you, Your Honor.

19 (Proceedings concluded at 11:09 a.m.)

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**C E R T I F I C A T I O N**

I certify that the foregoing is a correct transcription of  
the record of proceedings in the above-entitled matter.

s/ Sheri K. Ward  
Sheri K. Ward  
Official Court Reporter

11/18/2016  
Date

- - -